

*Orders*

BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

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Application of Steven Frisch to	)	
Place a Boardwalk and Pier on the	)	Case No. 3-SE-93-441
Bed of Nagawicka Lake, Village of	)	
Nashotah, Waukesha County	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMIT

Steven Frisch applied to the Department of Natural Resources for a permit to place a boardwalk across a tamarack bog and a pier on the bed of Lake Nagawicka. The Department issued a Notice of Waterway Alteration which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Several timely objections were filed.

On March 28, 1995, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted on May 1, 1995 and continued on October 17, 1995 and February 15, 1996 before Mark J. Kaiser, Administrative Law Judge. The hearing was held in Waukesha, Wisconsin. The parties were given the opportunity to submit written argument after the hearing. The last submittal was received on February 28, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

R & M Investments, Ltd., by

Steven Frisch  
N40 W32772 Wildwood Lane  
Nashotah, WI 53085

on May 1, 1996, and, by

Attorney Richard W. Double  
2100 North Mayfair Road, Ste. 102  
Wauwatosa, WI 53226

on October 17, 1995 and February 15, 1996

Wisconsin Department of Natural Resources, by

Attorney Michael J. Cain  
P. O. Box 7921  
Madison, WI 53707

Waukesha County Environmental Action League on  
October 17, 1995 and February 15, 1996, by

Attorney Joel V. Batha  
705 Lincoln Avenue  
Waukesha, WI 53186

Nagawicka Kettle Preservation Society, by

Jerrine Osenga  
N57 W30841 Lakewood Drive  
Hartland, WI 53029

Alan Giuffre  
3945 Hickory Knoll  
Hartland, WI 53029

#### APPLICABLE LAW

Section 30.12(2), Stats., provides in relevant part:

Permits to place structures or deposits in navigable waters; generally. The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure . . . , if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest.

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

- (a) The wharf or pier does not interfere with public rights in navigable waters.
- (b) The wharf or pier does not interfere with rights of other riparian proprietors.

(c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).

(d) The wharf or pier does not violate any ordinances enacted under sub. (2).

(e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Section 30.01(5), Stats., provides in relevant part:

"Pier" means any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.

Section 29.415(1), Stats., provides in relevant part:

The legislature finds that certain wild animals and wild plants are endangered or threatened and are entitled to preservation and protection as a matter of general state concern. . . . The legislature further finds that the activities of both individual persons and governmental agencies are tending to destroy the few remaining whole plant-animal communities in this state. Since these communities represent the only standard against which the effects of change can be measured, their preservation is of highest importance, and the legislature urges all persons and agencies to fully consider all decisions in this light.

#### FINDINGS OF FACT

1. R & M Investments, Ltd., 4251 Gulf Shore Blvd. - N, Suite 9-C, Naples, Florida 33940, owns property along the shore of Lake Nagawicka. The proposed project is located east of Lakeland Drive and northeast of Nashotah Road in the SW 1/4 of the SE 1/4 of Section 5, Township 7 North, Range 18 East, Village of Nashotah, Waukesha County, Wisconsin.

2. Steven Frisch, on behalf of R & M Investments, Ltd., (applicant) filed an application dated August 25, 1993, with the Department of Natural Resources (Department) for a permit pursuant to sec. 30.12, Stats., to construct a boardwalk across a tamarack bog and a pier on the bed of Lake Nagawicka. Lake Nagawicka is navigable at the site of the proposed pier. The Department and the applicant have complied with all procedural requirements of sec. 30.02, Stats.

3. The ordinary high water mark for Lake Nagawicka at the project site has been determined to be at the upland edge of the bog. The entire boardwalk and pier would be constructed below the ordinary high water mark of Lake Nagawicka.

4. Lake Nagawicka is an impoundment created by a dam on the Bark River. The area of the lake is 1,026 acres. It has a mean depth of 48 feet and a maximum depth of ninety feet. The lake has an oblong shape, with a maximum length of 2.8 miles and maximum width of 1.1 miles. The lake is oriented in a generally north-south direction.

5. The northern portion of Lake Nagawicka is commonly referred to as the "kettle." The kettle is connected to the main body of the lake by a channel. The site of the proposed project is located along the western side of the channel. The kettle is approximately 37.2 acres in size. The northern and western shores of the kettle are covered by a floating bog. The bog is approximately 42 acres in size.

6. The proposed project involves construction of a 600 feet long boardwalk across the bog and a pier forty feet long on the bed of Lake Nagawicka. The proposed boardwalk and pier will be four feet wide (in his testimony at the hearing Richard Kaerek, the president of R&M Investments, Ltd., reduced the requested width to forty inches). The boardwalk and pier will be composed of steel pipe posts with a treated wood deck. The purpose of the project is to provide access to Lake Nagawicka for two residential lots which the applicant intends to develop. The boardwalk and pier will be located on the lot line between the two properties.

7. The bog and western shoreline of the kettle are primarily undeveloped. Substantial portions of the bog are owned by the Department, the Village of Nashotah and the City of Delafield. The environmental importance of the bog and kettle is well documented in the record of a hearing concerning a permit for a boardwalk and pier for the Nagawicka Bay Sailing Club (NBSC). The NBSC boardwalk and pier are located a short distance north of the proposed site at issue for this hearing. Much of the investigation done by the Department for the NBSC permit was admitted to the record in the instant matter and is undisputed. In summary, the bog and kettle are environmentally important because they represent an ecosystem which is rare in southeastern Wisconsin and because they sustain a diverse population of native plants and animals.

8. The bog is an environmentally sensitive area. The NBSC boardwalk has already been constructed across the bog, another invasion of the bog mat by the proposed boardwalk is a further threat to the continued existence of the native species present in the bog. To the extent the bog contains threatened and endangered species, such as the snowy orchid, construction and maintenance of the proposed boardwalk will have adverse impacts.

Invasion of the bog mat also provides an opening for the spread of non-native nuisance species such as purple loosestrife and poison sumac. Use of chemical herbicides to control the nuisance species along the proposed boardwalk will result in further reduction of the native plant community in the bog. However, with the conditions attached to the permit, the adverse impacts of construction and maintenance of the proposed boardwalk can be minimized and will not be detrimental to the public interest.

9. The near shore and shoreline area of the kettle at the project site is prime habitat for the Blanding's turtle, a threatened species in Wisconsin. Other species on the state threatened list which have been observed in the kettle are the Pugnose Shiner and a tern (either a Common Tern or a Forster's Tern, the witness was not sure which species of tern he photographed, but both are on the threatened list). Increased human activity, particularly boating activity, resulting from the existence of a pier in this area will have a negative impact on these species.

10. Construction and maintenance of the proposed pier will result in the disturbance of the bottom sediments in the shallow, near shore area at the project site. The sediment on the lakebed in the near shore area at the project site is flocculent and highly organic. The sediment is easily disturbed by any boating activity in this area. Disturbance of the sediment will result in resuspension of particles in this area degrading the water quality of Lake Nagawicka.

The near shore area is used by several fish species, including northern pike, for spawning activities. Resuspension of bottom sediments will reduce the quality of this area for spawning activity. High quality spawning habitat is becoming increasingly rare in southeastern Wisconsin. The disturbance of the bottom sediment will also result in the disturbance of aquatic plants.

11. Disturbance of the bottom sediments at the site of the proposed pier also has potential chemical effects. One chemical effect is the release of nutrients contained in the sediment which will stimulate the algae bloom and aquatic plant growth. Another chemical effect is the release of a sediment associated toxicant. Investigation done in 1990 and 1991 in preparation for the NBSC hearing provided evidence that a toxicant (suspected to be unionized ammonia nitrogen) was released when the bottom sediment was disturbed by boating activity.

This investigation was done two years prior to the filing of the application which is the subject of this hearing and was directed at a site north of the site of this proposed project; however, the investigation occurred in the kettle and the testimony at the hearing was that the nature of the bottom sediment at the project site is the same as that at the NBSC pier site.

12. The near shore area of Lake Nagawicka at the project site contains an extensive stump field. This stump field makes it nearly impossible to navigate a boat in this area. The applicant obtained a permit from the Department to remove the stumps in 1989. This permit was subsequently withdrawn before the stumps were removed. The Department has indicated it will no longer permit the stumps to be removed because mechanical removal of the stumps will disturb the bottom sediment in the area and the presence of the stumps have beneficial impacts for fish and other wildlife. The stumps reduce wave action thus enhancing the area for use as a spawning area. The stumps also provide basking surfaces for amphibians, such as the threatened Blanding's turtle.

13. A pier extending to the line of navigation (three foot water depth) would extend into the channel connecting the kettle to the main body of the lake and as such would constitute an impairment to navigation for boats travelling through the channel. The applicant acknowledged that a pier extending to the line of navigation would obstruct navigation through the channel. The applicant is not seeking a permit for a pier of this length.

Although as found in paragraph two, the water depth at the end of the proposed pier meets the legal definition of navigability for jurisdictional purposes, Mr. Kaerek testified at the hearing that "where the [proposed] pier is located the water is not navigable . . . because of stumps and other obstructions underwater." Mr. Kaerek further testified that "we just want [the pier] to access the water for fishing purposes and uses of that nature."

14. Two other issues raised regarding the impacts resulting from the proposed project are the aesthetic impacts and cumulative impacts of the proposed project. The shoreline at the site of the proposed project is undeveloped and natural. Therefore, construction and maintenance of a pier at this site will unquestionably have a negative impact on the aesthetics of the natural shoreline. However, the proposed pier is relatively visually unobtrusive. The negative impact on the aesthetics of the natural shoreline is sufficiently minimized so that it is not detrimental to the public interest in the natural shoreline of the area.

With respect to cumulative impacts of the project, as mentioned above, much of the shoreline along the north and west side of the kettle is publicly owned. Based on the evidence in the record, there does not appear to be any other sites along the north or west side of the kettle which will be potential sites for additional piers. Therefore the cumulative impacts of the proposed project within the kettle are not significant.

15. Any boats using the proposed pier would disturb the bottom sediment in the near shore area of the project site. The disturbance of the bottom sediments will result in negative impacts on water clarity and water quality in the kettle. The disturbance of the bottom sediments will have a negative impact on spawning habitat, on habitat for threatened

or endangered species and on aquatic plants. These negative impacts are detrimental to the public interest.

16. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact. This project is a Type III project under NR 150, Wis. Adm. Code, and an appropriate public notification of the project was given.

#### Discussion

Any intrusion across the bog and the near shore area of the kettle is undesirable; however, riparian owners have a common law right of access to and from the lake upon the riparian's land and a right to build a pier in aid of navigation. State v. Bleck, 114 Wis.2d 454, at 466, 338 N.W. 2d 492 (1983). The issue in this case is how can this right of access be balanced with the public interest and rights in the bog and Lake Nagawicka. The boardwalk is undesirable; however, the impacts of construction and maintenance of the boardwalk are not so adverse that the permit should be denied. With the conditions in the permit the adverse impacts of construction and maintenance of the proposed boardwalk can be minimized.

The application for a permit for the pier is denied two reasons. The first reason is that construction and maintenance of pier would be detrimental to the public interest. Pursuant to sec. 30.13, Stats., a riparian is allowed to construct and maintain a pier if the "pier does not interfere with public rights in navigable waters." The proposed pier would be detrimental to the public interest in preserving habitat for threatened species and maintaining water quality in Lake Nagawicka.

The second reason for denying the application for a permit to construct and maintain the proposed pier is that the proposed structure does not meet the statutory definition of a pier. Pursuant to the definition set forth at sec. 30.01(5), Stats., a pier is for loading and unloading boats or for providing a berth for a boat. The applicant testified that due to underwater obstructions the water at the end of the proposed pier is not realistically navigable. The applicant acknowledges that a pier which would reach water which is navigable would extend into the channel connecting the kettle with the main body of the lake. A pier of this length would constitute a material obstruction to navigation. Accordingly, it does not appear that the structure which is proposed to be constructed on the bed of Lake Nagawicka can or will be used as a pier. Therefore, no permit may be issued for the proposed structure.

### CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed structures described in the findings of fact constitute structures within the meaning of sec. 30.12, Stats.
3. The boardwalk if constructed as proposed and subject to the conditions specified in the permit will not materially obstruct navigation or reduce the effective flood flow capacity of Lake Nagawicka and is not detrimental to the public interest in navigable waters.
4. The proposed pier is detrimental to the public interest and; therefore does not meet the requirements for a pier set forth at sec. 30.12, Stats. Additionally, testimony at the hearing revealed that the area in which the pier would be located is not practically navigable and the applicant does not foresee the pier being used for boating activities. Therefore the structure does not meet the definition of a pier.
5. The proposed project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
6. The Division of Hearings and Appeals has authority pursuant to secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue the following order and permit.

### ORDER

The application to construct a pier on the bed of Lake Nagawicka is denied.

### PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction and maintenance of a boardwalk as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.



2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department for the purpose of investigating the construction, operation and maintenance of the project.

3. A copy of this permit shall be kept at the site at all times during the construction of the structures.

4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then. Pursuant to sec. 30.07(1)(b), Stats., for good cause, the Department may extend the time limit for the permit for no longer than two years if the grantee requests an extension prior to expiration of the initial time limit.

5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. The permittee shall notify the area Water Management Specialist, not less than five working days before starting construction and again not more than five days after the project has been completed.

7. The boardwalk will be a maximum 3.5 feet wide or the minimum width necessary to meet any applicable requirements of the Americans with Disability Act, whichever is greater. The deck of the boardwalk shall be eighteen inches above the vegetation mat of the bog.

8. The placement of the boardwalk will be done in the winter and the work will be done by hand. There will be no removal of tamarack trees for the project. The boardwalk will be installed so as to avoid the tamarack trees.

9. Removal of vegetation should be prohibited as stated in the Nagawicka Lake Plant Management Plan (August 1993, page 23). The use of chemical herbicides in the bog area is prohibited.

10. A copy of this permit shall be filed with Waukesha County Register of Deeds to ensure that potential purchasers of the lots are aware of these limitations and restrictions. Proof of filing with the Register of Deeds shall be provided to the Department.

11. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on April 16, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By Mark Kaiser  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.